REMARKS

Claims 46-146 were pending at the time the present Office Action was mailed. By this amendment, claims 46, 50, 64, 70, and 119-122 have been amended. Claims 46-146 remain pending in the present application.

The following is a summary of the Office Action and associated objections and rejections.

(A) Claims 46-146 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-30 of U.S. Patent No. 6,602,068.

(B) The specification was objected to for failing to provide antecedent basis for claimed subject matter, specifically the claim terms "recessed" and "spacer."

(C) Claims 46-51, 55, 56, 58, 59, 61-75, 79-92, 94-96, 98-104, 106-125, 128-135, 139-146 were rejected under 35 U.S.C. § 103(a) as being unpatentable over GB002334328 (Shimek GB '328) in view of GB002068106 (Rosiek) and GB002035545 (Palau).

(D) Claims 53, 54, 60, 78, 93, 97, 126, 127 and 136-138 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Shimek GB '328 in view of Rosiek and Palau, and further in view of U.S. Patent No. 5,941,237 (Shimek '237) or U.S. Patent No. 4,726,351 (Whitaker).

(E) Claims 57, 76, 77 and 105 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Shimek GB '328 in view of Rosiek and Palau, and further in view of U.S. Patent No. 5,046,944 (Smith).

A. Double Patenting Rejection

In the Office Action, the Examiner rejected claims 46-146 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-30 of U.S. Patent No. 6,602,068. The Examiner indicated that he did not receive the Terminal Disclaimer referred to in Applicant's response dated January 25, 2005. In an effort to expedite prosecution, and without acquiescing to the basis or validity of the double patenting rejection, applicants hereby submit a Terminal Disclaimer with respect to U.S. Patent No. 6,602,068. In view of the Terminal Disclaimer, applicants respectfully submit that the rejection for double patenting of claims 46-146 has been overcome and requests that the Examiner withdraw the rejection.

B. Rejection to Specification

The Examiner objected to the specification as failing to provide antecedent basis for claimed subject matter, namely the claim terms "recess" (claim 46) and "spacer" (claim 55). M.P.E.P. § 608.01(o) states that "while an applicant is not limited to the nomenclature used in the application as filed, he or she should make appropriate amendment to the specification whenever this nomenclature is departed by an amendment from the claims so as to have clear support or antecedent basis in the specification for the new terms appearing in the claims." (Emphasis added.)

Applicants respectfully submit that the specification as filed (including the Figures) provides clear support for the claim terms "recessed" and "spacer" such that amendments to the specification to add "recessed" and "spacer" is not required under 37 C.F.R. § 1.75(d)(1) and M.P.E.P. § 608.01(o). For example, Figures 3, 6, 12, 13, 15 and 16, along with the descriptions of these figures in the specification provide clear support for first and second recessed gas distribution chamber portions. Therefore, applicants respectfully submit that the specification does not need to be amended to specifically recite the word "recessed" to sufficiently satisfy the requirements of 37 C.F.R. § 1.75 and M.P.E.P. § 608.01(o).

Regarding the claim language "spacer", applicants further submit that the specification, including the drawings as originally filed provide clear support for the claim language. As an example, Figure 3 clearly shows gasket 26 that supports the burner body and spaces the burner body above the burner pan. In this embodiment, the gasket has a sufficient thickness so as to be a spacer. In addition to the gasket being a spacer, the gasket could also be part of the spacer that supports the burner body apart from the burner pan forming an interior gas distribution chamber between the burner pan and the burner body. In yet another embodiment, such as the embodiment shown and described in conjunction with Figures 17-20, the vertical portions of the fences are spacers that support the burner body apart from the burner pan forming the interior gas distribution chamber. Accordingly, the specification (including the Figures) as originally filed provides clear support for different embodiments of a spacer of a burner assembly, thereby providing the clear support for the claim terms. Therefore, the specification does not need to be amended to specifically recite the term "spacer" to satisfy the requirements of 37 C.F.R. § 1.75 and M.P.E.P. § 608.01(o). In view of the above, applicants respectfully request that the Examiner withdraw the objection to the specification.

C. Rejection of Claims 46-51, 55, 56, 58, 59, 61-75, 79-92, 94-96, 98-104, 106-125, 128-135 and 139-146 Under 35 U.S.C. § 103(a)

In the Office Action, the Examiner rejected claims 46-51, 55, 56, 58, 59, 61-75, 79-92, 94-96, 98-104, 106-125, 128-135 and 139-146 under 35 U.S.C. § 103(a) as being unpatentable over Shimek GB '328 in view of Rosiek and Palau. To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974). "All words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165 U.S.P.Q. 494, 496 (CCPA 1970). If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988).

Applicants respectfully submit that the three applied references can not support an obviousness rejection of the claims. Shimek GB '328 is directed to a dual-purpose indoor/outdoor portable gas burner that "may be used in a fireplace as a burner, or on a deck as a campfire or a grill and/or as a portable and storable campfire grill." Page 2, lines 2-5. See also page 2, lines 8-11. Shimek GB '328 also states "it is another principal object of the present invention to provide a campfire or stove cooking unit for use inside or outside of a living area." (Page 2, lines 23-25.) The indoor/outdoor portable gas burner of Shimek GB '328 has a base unit made of a thermoset plastic to provide a decorative unit, and a contoured ceramic-fiber top fixed to the base unit to provide a hollow manifold therebetween adapted to receive a mixture of gas and air through a supply gas pipe. (Page 4, lines 23-26.) The reference states "the novel gas burner unit is provided with a three-dimensional contoured surface in the ceramic fiber top and a pattern of burner jets extend through the ceramic fiber top into the gas manifold for creating a desired gas flame pattern." This flame pattern is configured to be suitable for use in a fireplace, or as a campfire, or as a cooking grill; the flame pattern is not suitable just for a fireplace.

Shimek GB '328 further discloses the indoor/outdoor portable gas burner as being the type that can be placed under a set of artificial logs placed on a grate, located in a conventional fireplace or in a fabricated fireplace unit. The indoor/outdoor portable gas burner is not configured to directly support the simulated logs on the contoured surface. Such configuration is understandable because the gas burner is specifically designed for dual-purpose versatility, so it can also be placed under a grill support such that the burner assembly is used as a stove or grill. (Page 7, lines 2-6 and 20-23.) Accordingly, the contoured ceramic top and the burner jets are specifically configured to be used for multiple purposes. In fact, Shimek GB '328 discloses and distinguishes the dual-purpose burner assembly from the prior art that includes sole-purpose fireplace burners used specifically in gas fireplaces or hollow log burners of the type manufactured for use in artificial log campfires. Accordingly, Shimek GB '328 distinguishes these sole-purpose prior art units from its dual-purpose indoor/outdoor portable gas burner.

In the Office Action, the Examiner asserts that Shimek GB '328 can be combined with Rosiek and Palau to provide the invention as set forth in the rejected claims. Such a combination of references, however, would destroy the intended purpose of the dual-purpose indoor/outdoor portable gas burner of Shimek GB '328. Rosiek is directed to a gas burner for a fireplace to provide a coal-effect gas fire. This sole-purpose burner has a plate-like rectangular plate-like ceramic top member that sits atop a plenum chamber. Roseik teaches the gas burner with a generally flat burner surface and gas/air mix feed bores regularly spaced apart from each other and that open onto a planar surface upon which coal and/or log elements, can be located. The coal or log elements are mounted on supports that may be leg-like projections of the elements or projections from the burner surface, wherein the elements are spaced not less than 12 mm and not more than 20 mm above the burner surface. Rosiek emphasizes that, for continuous uniformity of flames at least three gas/air mix feed bores must be provided in the minimum 7 mm space in between the supports for the coal or log elements. Therefore, Rosiek specifically defines a sole-purpose burner for a solid fuel effect gas fire in a fireplace.

Modifying the structure of Shimek GB '328 to provide the plate-like ceramic member that sits atop a plenum and is configured with its air/gas mix feed bores and with projections that support the coal and/or log elements for an indoor fireplace would destroy the intended purpose of the dual-purpose indoor/outdoor portable burner of Shimek GB '328. The refererences provide is no teaching or suggestion of modifying the indoor/outdoor portable burner of Shimek GB '328 to configure it for use as the sole purpose as a fireplace burner of Rosiek. In fact, Shimek GB '328 specifically teaches away from modifying the portable indoor/outdoor burner with features designed for the single-purpose burner of Rosiek. Therefore, Shimek GB '328 cannot be properly combined with Rosiek to provide the claimed invention without the benefit of impermissible hindsight analysis and without destroying the intended function of the dual-purpose burner assembly of Shimek GB '328.

The Examiner further combined Shimek GB '328 and Rosiek with Palau. Palau, however, is directed to a flat heating plate with a front surface formed having a number of fancifully-shaped protuberances free of apertures, which are formed in the rest of the flat plate. Applicants respectfully submit that modifying Shimek GB '328 and/or Rosiek to provide flat heating plates with a plurality of apertures in all areas except for fancifully-shaped protuberances would destroy the intended function of the plate-like ceramic member of Rosiek with its specifically spaced leg-like projections and air/gas mix apertures. Further, modification of Rosiek to modify the rectangular plate-like ceramic member to provide the plurality of apertures in the flat portions and protuberances that simulate logs would destroy the intended function of the projections that are intended to support a simulated log. Such modification would also destroy the intended function of the dual-purpose indoor/outdoor burner of Shimek GB 328. Therefore, the three references can not be properly combined to form the basis for an obviousness rejection of the claims in the present application.

Further, any modification of Shimek GB '328 in view of Rosiek and Palau to provide the claimed burner assemblies would only be apparent to one skilled in the art after fully understanding the present invention and applying impermissible hindsight analysis to the references. Any such modification to provide the features as recited in the pending claims would be apparent only upon using the present application as a blueprint to pick and choose the selected features from the three different references in an impermissible piecemeal manner.

Even if the three applied references could be properly combined, the combination of references still do not teach each and every claim feature as recited in the claims. As an example, claim 46 is directed to the burner assembly having a burner body with first and second recessed gas distribution chambers formed in the lower portion of the burner body. The upper portion of the burner body has a contoured surface with a plurality of integral peaks and valleys and the contoured surface that simulates a generally planar portion with a plurality of simulated coal members arranged in a simulated ember bed. The burner

body has gas distribution apertures extending from the lower portion of the contoured surface and the first set of the gas distribution apertures extend through the burner body to the first recessed gas distribution chamber portion. A second set of distribution apertures extend through the burner body to the second recessed gas distribution chamber portion, wherein the gas distribution apertures are positioned to direct a flow of fuel gas to the contoured upper surface for ignition.

Claim 46 has been amended to clarify that the first set of gas distribution apertures and the first recessed gas distribution chamber portion is configured to provide a first flow rate of fuel gas through the burner body for ignition and a first flame characteristic. The second set of gas distribution apertures and the second recessed gas distribution chamber portion is configured to provide a second flow rate of fuel gas through the burner body for ignition and a second flame characteristic different than the first flame characteristic. The burner assembly further includes a simulated log supported adjacent to the simulated ember bed. The amendment to claim 46 is fully supported by the specification as originally filed and no new matter has been added.

None of the three applied references disclose or teach such a burner assembly configuration as provided in claim 46. Any modification of the burner assembly of Shimek GB '328 to modify the ceramic fiber top with the teachings of Rosiek or Palau would change the configuration of the dual-purpose burner in a manner provided for single-user burners, which would change the performance of the burner regarding combination efficiency, heat generation, sooting and the like. Such modifications, in addition to destroying the intended function of the references, would only be apparent to one skilled in the art after understanding the present invention and applying impermissible hindsight analysis. Therefore, applicants respectfully submit for these and the above reasons that claim 46 is patentable over the applied references and is condition for allowance.

Claims 47-49 depend from claim 46. Applicant respectfully submits for the above reasons and the features of the claims, that these dependent claims are also patentable over the applied references and are in condition for allowance.

Claim 50 has been amended to clarify that the burner assembly comprises a base, a nonmetallic burner body with a lower portion sealably coupled to the base forming a recessed interior gas distribution chamber and having an upper portion with a contoured surface having simulated coal members and a flat portion forming a simulated-log-support surface adjacent to the simulated coal members. The simulated-log-support surface has guide means and a simulated log is supported by the simulated-log-support surface adjacent to the simulated coal members, and the guide means is configured to align the simulated log relative to the upper portion of the burner body. The dual-purpose burner assembly of Shimek GB '328 is specifically designed to be positioned under a grate that supports the logs over a burner assembly. The dual-purpose aspect of Shimek GB '328 teaches away from supporting the simulated loss directly on the contoured ceramic fiber top. Rosiek and Palau do not correct the deficiencies of the primary reference. Further, as indicated above, the three applied references cannot be properly combined to form the basis of the obviousness rejection. Therefore, claim 50 is patentable over the applied references and is condition for allowance.

Claim 51 depends from claim 50. For the above reasons, and the features of the claim, claim 51 is also patentable over the applied references and is in condition for allowance.

Claim 55 is patentable over the applied references for the above reasons. Further, claim 55 is directed to a burner assembly with a burner pan, a spacer, and a burner body with upper and lower portions. The lower portion of the burner body is supported apart from the burner pan by a spacer forming an interior gas distribution chamber between the burner pan and the burner body. An upper portion of the burner body has a contoured surface formulating simulated coal members. A plurality of gas distribution apertures are

positioned to direct a flow of fuel gas from the interior gas distribution chamber to the contoured surface for ignition. The burner body is constructed of a material that glows at selected color variations in the simulated coal members to simulate a burning and glowing coal ember bed in the base of a fire when the fuel gas is ignited adjacent to the contoured surface.

None of the applied references teach a burner assembly with a burner pan and a burner body wherein a lower portion of the burner body is supported apart from the burner pan by a spacer forming an interior gas distribution chamber as set forth in claim 55. The applied references provide no teaching or suggestion of providing a burner assembly with a spacer as set forth in claim 55. Shimek GB '328 is simply silent with respect to such a configuration. Shimek GB '328 teaches the ceramic-fiber top of the dual-purpose indoor/outdoor burner adhered directly on to the base. While the Examiner asserted an interpretation of Shimek GB '328 to provide a spacer, the reference does not teach or suggest such an interpretation. The Examiner's interpretation is only apparent after understanding the present application and, with the benefit of hindsight analysis, crafting a reading of the reference that is really supported by the four corners of the document because the document is silent regarding a spacer as claimed.

Further, Rosiek teaches providing a plate-like member supported atop the plenum. Palau is silent regarding how the heating plates are mounted. As indicated above, there is no motivation or suggestion of modifying the indoor/outdoor portable gas burner of Shimek GB '328 with the structure of Rosiek or Palau would still not provide the burner assembly with the burner pan, the spacer and the burner body as defined. Accordingly, the combination of references still does not provide each and every element of the burner assembly as recited in claim 55. Therefore, applicants respectfully submit that claim 55 is patentable over the applied references and is condition for allowance.

Claims 56, 58, 59, 61-63, 145, and 146 depend from claim 55. For the above reasons and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

Regarding claim 64, the claim is directed to a burner assembly having a base, a spacer adjacent to the base, and a burner body with a lower portion of the burner body spaced apart from the base by the spacer to form an interior gas distribution chamber therebetween. The lower portion of the burner body has a flat undersurface portion generally parallel to the base of the burner pan and the lower portion has a recessed underportion spaced apart from the burner pan's base and recessed from the burner body's flat undersurface portion. The recessed underportion defines a portion of the gas distribution chamber.

None of the applied references taken alone or in combination disclose or teach a burner assembly with the burner body as set forth in claim 64 for the reasons discussed above. The Examiner specifically identifies the discussion in Shimek GB '328 regarding Figure 9 showing a hollow ceramic fiber top with a pattern of burner jets and supporting structure which surrounds an H-shaped gas manifold area. The reference, however, provides no additional disclosure or teaching with respect to the ceramic fiber top with an H-shaped manifold area. There is no teaching or suggestion of the use of a spacer in conjunction with a burner body as set forth in claim 64. There is no teaching or suggestion of the burner body spaced apart from the base by the spacer and having a lower portion of the burner body with a flat undersurface portion generally parallel to the base of the burner pan and a recessed underportion as recited. Shimek GB '328 provides no such teaching of this structure. Rosiek and Palau teach plate-like structures with flat bottom surfaces and no spacers. Accordingly, Rosiek and Palau do not correct the deficiencies of Shimek GB '328. The only teaching of the claimed burner assembly is provided in the present application and cannot be read into Shimek GB '328 without the use of impermissible hindsight analysis. Therefore, for the reasons discussed above and the features in the

claim, applicants respectfully submit that claim 64 is patentable over the applied references and is in condition for allowance.

Dependent claims 65-69 depend from claim 64. For the above reasons and the features of these claims, these dependent claims are also patentable over the applied references and are in condition for allowance.

Claim 70 has been amended to clarify that the burner assembly comprises a base with a burner body having upper and lower portions with the burner body being spaced apart from the base forming a sealed interior gas distribution chamber with first and second chamber portions and a first set of gas distribution apertures is in communication with the first chamber portion and configured to provide a first flow rate of fuel gas to the contoured surface for ignition in a first flame characteristic. A second set of gas distribution apertures is in communication with the second chamber portion and is configured to provide a second flow rate of fuel to the contoured surface for ignition and a second flame characteristic different than the first flame characteristic. For the reasons discussed above, the three applied references do not teach or suggest each and every feature of claim 70 Any modification of the references provide the burner assembly of claim 70 would destroy the intended functions of the references. Further, such modification would only be apparent with the benefit of impermissible hindsight analysis. And, the combination of references would still not provide the claimed burner assembly. Therefore, claim 70 is allowable over the applied references and is in condition for allowance.

Claims 71 and 72 depend from claim 70. For the above reasons and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

Claim 73 is directed to a burner assembly having a base and a burner body. The burner body has a lower portion with a flat first undersurface portion spaced apart from the base and a second undersurface spaced apart from the base and recessed from the first

undersurface portion. The second undersurface defines a portion of the interior gas distribution chamber. The upper portion of the burner body has a contoured surface simulating coal members. The burner body is constructed of a material that glows at selected color variations when the fuel gas is ignited. For the reasons discussed above, including the discussion regarding claim 64, claim 73 is patentable over the applied references, and is in condition for allowance.

Dependent claims 74, 75, 78, and 80 depend from claim 73. For the above reasons and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

Regarding independent claim 81, the claim is directed to a burner assembly with a burner body having upper and lower portions. The lower portion has first and second chamber portions configured to allow the flow of fuel gas to move from the first chamber portion to the second chamber portion. The upper portion of the burner body has a contoured surface with a plurality of peaks and valleys forming a plurality of simulated coal members, and a portion of the contoured surface forms a simulated log support portion to support one or more simulated logs adjacent to the simulated coal members. The burner body is constructed of a material that glows at selected color variations in the simulated coal members when the fuel gas from the gas distribution apertures is ignited adjacent to the contoured surface.

As discussed above, Shimek GB '328 does not disclose a burner assembly having a burner body with an upper portion having a contoured surface forming a plurality of simulated coal members and a portion forming a simulated log support portion that supports one or more simulated logs adjacent to the simulated coal members. Shimek GB '328 further is silent with respect to providing a burner body constructed of a material that glows at selected color variations in the simulated coal members when the fuel gas is ignited adjacent to the contoured surface as claimed. Rosiek and Palau do not correct the deficiencies of Shimek GB '328. Modifying the teachings of Shimek GB '328 in accordance

with the teachings of Rosiek and Palau would destroy the intended function of Shimek GB '328, so the references can not be properly combined to support an obviousness rejection of the pending claims. Any modification of the three applied references to provide the burner assembly as claimed would only be apparent to one skilled in the art after fully understanding the present invention, and applying impermissible hindsight utilizing the present application as a blueprint for an improper piecemeal construction of the references. Therefore, independent claim 81 is patentable over the applied references and is in condition for allowance.

Dependent claims 82-86 depend from claim 81. For the above reasons and the features in the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

Regarding claim 87, the claim is directed to a burner assembly with a non-metallic burner body and at least one simulated log thereon. The burner body has upper and lower portions, and the lower portion has first and second recessed gas distribution chamber portions formed therein. The upper portion has a contoured surface with a plurality of integral peaks and valleys that form a plurality of simulated coal members arranged in a simulated ember bed. The first and second recessed gas distribution chamber portions in combination with gas distribution apertures are positioned to direct a flow of the fuel gas to the contoured upper surface for ignition to provide flames that move relative to the contoured upper surface and about the simulated log in a manner that simulates a natural wood burning fire.

None of the references disclose or teach a burner assembly with a burner body and at least one simulated log thereon as set forth in claim 87. Shimek GB '328, as discussed above, teaches a dual-purpose portable indoor/outdoor burner that is not configured to support a simulated log thereon. Any modification of the reference to incorporate the features from Rosiek and Palau would destroy the intended function of the Shimek GB '328. Further, none of the three applied references taken alone or in combination

discuss, teach, or suggest an assembly with first and second recessed gas distribution chambers arranged in combination with the gas distribution apertures that are positioned to direct the fuel gas to the contoured upper surface for ignition of the gas to provide particular flame characteristics for movement relative to the contoured upper surface and about the simulated log in a manner that simulates a natural wood burning fire. The only teaching of such a configuration is provided by the present application.

Any modification of Shimek GB '328 to provide the burner assembly of the present invention would change the dual-purpose burner's configuration, which would change its performance or flame characteristics to flames specifically suited for a fireplace, rather than for either a fire place or a camp fire, or a grill, and/or a portable and storable campfire grill. Accordingly, any modification of the three applied references to provide the configuration of claim 87 would only be apparent to one skilled in the art after fully understanding the present invention and applying impermissible hindsight analysis. Such a modification would also destroy the intended function of Shimek GB '328, as discussed above. Therefore, applicants respectfully submit that claim 87 is patentable over the applied references and is in condition for allowance.

Claims 88-92 depend from claim 87. For the above reasons and the features in the claims, these dependent claims are also patentable over the applied references. Further, regarding claim 91, this dependent claim is directed to the burner assembly of claim 87 wherein the base is spaced apart from the burner and a gasket is positioned between the burner body and the base. As discussed above, none of the applied references teach or suggest spacing the burner body apart from the base with a gasket positioned between the burner body and the base. The applied references are simply silent with respect to such a configuration. Accordingly, the applied references do not teach each and every feature of the claim, and any modification to provide such a feature would only be apparent after understanding the present invention and applying impermissible hindsight analysis. Therefore, claim 91 is patentable over the applied references and is in condition for allowance.

Regarding claim 92, this dependent claim includes the base of the burner assembly that has a flat top surface at a separator positioned between the top surface and the burner body to support the burner body away from the top surface. None of the references disclose or teach such a configuration with a separator as claimed. The burner of Shimek GB '328 is adhered with an adhesive bead directly to the base with no separator therebetween. Rosiek teaches the plate-like ceramic member with the flat lower surface sitting directly atop the plenum member, and Palau teaches heating plates while providing no discussion whatsoever regarding a base and/or a separator. Accordingly, the applied references taken alone or in combination do not teach or suggest each and every feature recited in the claim. Therefore, claim 92 is patentable over the applied references and is in condition for allowance.

Claim 94 is directed to a burner assembly having a base with a non-metallic burner body with a lower portion spaced apart from and sealably coupled to the base to form a recessed gas distribution chamber configured to receive fuel gas therein from the gas source. The upper portion of the burner body has a contoured surface with a plurality of integral peaks and valleys shaped as simulated coal members, and the contoured surface forms a simulated-log-support surface. The burner body is constructed of a material that glows at selected color variations in the simulated coal members to simulate a burning and glowing ember bed in the base of a fire. The burner body is specifically configured with the contoured surface and the gas distribution apertures to create flames that move relative to the contoured surface of the burner body and simulate a natural wood burning fire. A simulated log is supported by the log support surface adjacent to the simulated coal members.

None of the applied references teach or suggest a burner assembly with each and every element of claim 94. For example, none of the references teach the non-metallic burner body with a lower portion spaced apart from and sealably coupled to the base to form a recessed gas distribution chamber as claimed. None of the references teach or suggest the claimed burner body having a contoured surface with the simulated coal

members and the simulated log support surface with a simulated log thereon, and wherein the contoured surface and gas distribution apertures are sized and configured to create the flames that move relative to the contoured surface of the burner body to simulate a natural wood burning fire. Any modification of the references would only be apparent to one skilled in the art after understanding the present invention and applying impermissible hindsight analysis. Further, modification of the primary reference with features from Rosiek and/or Palau in an effort to provide the burner assembly of claims 94 would destroy the intended function of the multi-purpose indoor/outdoor burner as discussed above. Even if the three applied references could be properly combined, the references still do not teach or suggest each and every feature as claimed. Therefore, claim 94 is patentable over the applied references and is in condition for allowance.

Claims 95, 96 and 98 depend from claim 94. For the above reasons and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance. Further, dependent claim 96 includes a base that has a generally flat top surface and a separator is positioned between the top surface and the burner body to support the burner body away from the top surface. The references are silent with respect to such a separator. The only teaching of such a separator is provided by the present application. Therefore, even if the three applied references could be properly combined, they still do not teach each and every feature of the burner assembly of claim 96. Therefore, the claim is patentable over the applied references and is in condition for allowance.

Regarding claim 98, this dependent claim includes the gas distribution chamber that has first and second chamber portions recessed from the base, wherein the first chamber portion is larger than the second chamber portion and a greater number of gas distribution apertures communicate with the first chamber portion than the number of gas distribution apertures in communication with the second chamber portion. Such a configuration of the first and second gas distribution chambers and the number of apertures directly affects the resulting flame characteristic that occurs at the upper surface of the burner body above the

respective first or second chamber portions. None of the applied references teach or suggest such a gas distribution chamber as set forth in claim 98. The references provide no such discussion of a burner assembly with first and second gas distribution chambers of different sizes and having a different number of gas distribution apertures, as set forth in claim 98. Therefore, even if the references could be properly combined, they still do not disclose each and every feature of the burner assembly of claim 98. Therefore, the claim is patentable over the applied references and is in condition for allowance.

Regarding claim 99, the claim is directed to a burner assembly with a burner pan, a separator, and a burner body. The claim includes a burner body with the lower portion supported away from the burner pan by the separator, thereby forming a gas distribution chamber between the burner pan and the burner body. None of the applied references disclose, teach, or suggest the burner assembly as claimed with the burner pan, a separator, and a burner body wherein the lower portion of the burner body is supported apart from the burner pan by the separator to a gas distribution chamber between the burner pan and the burner body. The only teaching of the burner assembly as claimed with such a configuration is provided by the present application. As discussed above, any modification of the three applied references to provide the burner assembly with such a configuration would only be apparent after understanding the present invention and applying impermissible hindsight analysis. Further, the applied references can not be properly combined without destroying the intended function of at least the primary reference. Therefore, claim 99 is patentable over the applied references and is in condition for allowance.

Claims 100-104 and 106-110 depend from claim 99. For the above reasons and the features of these claims, these dependent claims are also patentable over the applied references and are in condition for allowance.

Regarding claim 111, the claim is directed to a burner assembly with a base, a separator adjacent to the base, and a burner body having upper and lower portions

wherein the lower portion of the burner body is spaced apart from the base of the burner pan by the separator with a gas distribution chamber therebetween and configured to receive a flow of fuel gas from the gas source. The lower portion of the burner body has a flat undersurface generally parallel to the base of the burner pan and the lower portion has a recessed under portion spaced apart from the base and recessed from the burner body's flat undersurface portion. The recessed under portion defines a portion of the gas distribution chamber. The upper portion of the burner body has a contoured surface forming simulated burning members and a plurality of gas distribution apertures extend through the burner body to the contoured upper surface.

None of the applied references alone or in combination teach a burner assembly with such a configuration having a base, a separator adjacent to the base, and the burner body as claimed. None of the references teach or suggest a burner assembly having a burner body with a lower portion spaced apart from the base of a burner pan by the separator and wherein the lower portion of the burner body has the flat undersurface portion and a recessed under portion spaced apart from the base and recessed from the burner body's flat undersurface portion. The references are simply silent with respect to such a configuration. As discussed above, the references can not be properly combined without destroying the intended function of at least the primary reference. Further, even if the references could be properly combined, they still do not teach each and every feature of the burner assembly of claim 111. Therefore, the claim is patentable over the applied references and is in condition for allowance.

Dependent claims 112-118 depend from claim 111. For the above reasons and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

Regarding claim 119, this claim has been amended to clarify that the burner assembly is for use with a simulated log and for burning a fuel gas from a gas source. The burner assembly has a base, a burner body spaced apart from the base forming a gas

distribution chamber therebetween, wherein an upper portion of the burner body has a contoured surface with a plurality of integral peaks and valleys and the burner body is configured to support the simulated log on the contoured surface. The burner body has a plurality of gas distribution apertures extending therethrough from the lower portion of the contoured surface to the upper portion. At least a portion of the upper surface and the burner body are constructed with the contoured upper surface and the gas distribution apertures configured, when the fuel gas is ignited adjacent to the upper surface and the simulated log, to provide flames that move about the contoured upper surface and the simulated log in a manner that simulates a natural wood burning fire. For the reasons discussed above, applicant respectfully submits that the applied references can not be properly combined to form the basis of an obviousness rejection. Further, the applied references do not teach each and every feature of the burner assembly as set forth in claim 119. Any modification of the applied references to provide such a burner assembly would only be apparent after understanding the present invention and applying impermissible hindsight analysis. Further, such modification would destroy the intended function of at least the primary reference. Therefore, applicant respectfully submits that claim 119 is patentable over the applied references and is in condition for allowance.

Regarding claim 122, this claim has been amended. Claims 120 and 121 have been amended to correct the dependency so as to depend from claim 119. For the reasons discussed above and the features of these claims, claims 120 and 121 are patentable over the applied references and are in condition for allowance. Claim 122 has been amended to clarify that the burner assembly is for use with a simulated log. The burner assembly has a base and a burner body, when the burner body has an upper portion with a contoured surface simulating coal members and having a plurality of gas distribution apertures extending from the gas distribution chamber to the contoured surface. The burner body is constructed to provide flames, when the fuel gas is ignited, to move relative to the simulated log in a manner that resembles a natural wood burning fire. For the reasons discussed above, applicant respectfully submits that the applied

references can not be properly combined to form the basis of an obviousness rejection. Further, the applied references do not teach each and every feature of the burner assembly as set forth in claim 122. Any modification of the applied references to provide such a burner assembly would only be apparent after understanding the present invention and applying impermissible hindsight analysis. Further, such modification would destroy the intended function of at least the primary reference. Therefore, applicant respectfully submits that claim 122 is patentable over the applied references and is in condition for allowance.

Claims 123-125 depend from claim 122. For the reasons set forth above and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

Regarding claim 128, the claim is directed to a burner assembly with a base, a burner body with a lower portion sealably coupled to the base to form a gas distribution chamber wherein the lower portion of the burner body has first and second chamber portions configured to allow the flow of fuel gas to move from the first chamber portion to the second chamber portion. The upper portion of the burner body has a contoured surface simulating coal members and a portion forms a simulated log support portion to support one or more logs adjacent to the simulated coal members. The burner assembly includes a separator between the base and the burner body that separates the burner body from the base. For the reasons discussed above and the features of this claim, independent claim 128 is also patentable over the applied references. Any modification of the applied references to provide the burner body as set forth in claim 128 would destroy the intended purpose of at least the primary reference. Even if the applied references could be properly combined, the applied references still do not teach each and every feature as recited in claim 128, as discussed above. Therefore, claim 128 is patentable over the applied references and is in condition for allowance.

Dependent claims 129 and 130 depend from claim 128. For the above reasons and the features in the claims, these claims are patentable over the applied references and are in condition for allowance.

Regarding claim 131, the claim is directed to a burner assembly having a base, a burner body with upper and lower portions and a spacer between the lower portion of the burner body and the base. The lower portion of the burner body is sealably coupled to the base to form a gas distribution chamber having a first chamber portion and a second chamber portion configured to allow the flow of fuel gas to move from the first chamber portion to the second chamber portion.

As discussed above, none of the applied references disclose or teach a burner assembly with a base, a burner body with the lower portions as claimed, and a spacer assembly between the lower portion of the burner body and the base. Further, the burner body's upper portion has the plurality of simulated coal members, and a portion forming the simulated log support portion to support one or more simulated logs adjacent to the simulated coal members and wherein the burner body is constructed of a material that glows at selected color variations in the simulated coal members when the fuel gas is ignited adjacent to the control surface. Again, for the reasons discussed above, none of the applied references teach the burner assembly with each and every feature as set forth in the claim. Combining the applied references as asserted by the Examiner would destroy the intended function of at least the primary reference. Further, even if the applied references could be properly combined, the references, still do not teach each and every feature recited in claim 131. Therefore, claim 131 is patentable over the applied references and is in condition for allowance.

Regarding claim 135, the claim is directed to a burner assembly with a base, a simulated log, and a burner body with a lower portion sealably coupled to the base and having a recessed gas distribution chamber integrally formed therein. The upper portion of the body has a simulated log thereon and a contoured surface having integral peaks and

valleys resulting in a burner body having different thicknesses between the recessed gas distribution chamber and the contoured surface. The burner body is configured to distribute fuel gas to the upper portion and around the simulated log to provide a flame having color variations and movements that simulate a natural wood burning fire.

None of the applied references disclose, teach, or suggest a burner assembly with each of the features as recited in claim 135. The references are silent with respect to a burner body having a recessed gas distribution chamber formed integrally therein and having different thicknesses between the recessed gas distribution chamber and a contoured surface as claimed. Such a configuration of the burner body with the different thicknesses and the gas distribution apertures as set forth in the claim allows for fuel gas to be distributed to the upper portion and around the simulated log to provide the color variations and movements that simulate the natural wood burning fire. The applied references are silent regarding the claimed combination of features of claim 135 to provide a flame with color variations and movements that simulate a natural wood burning fire as set forth in claim 135.

Any modification of the teaching of the applied references to provide the burner assembly of claim 135 would only be apparent after understanding the present invention and applying impermissible hindsight analysis. As discussed above, the applied references can not be properly combined without destroying the intended function of at least the primary reference. Further, even if the applied references could be properly combined, the references taken alone or in combination fail to teach each and every feature as recited in claim 135. Therefore, claim 135 is patentable over the cited references and is in condition for allowance.

Claim 142 is directed to a burner assembly having a base, a separator adjacent to the base, and a burner body with a lower portion spaced apart from the base by the separator with a gas distribution chamber therebetween and configured to receive a flow of fuel gas from a gas source. The lower portion of the burner body of the claim has a flat

undersurface portion generally parallel to the base. The lower portion has a recessed under portion spaced apart from the base and recessed from the burner body's flat undersurface portion. As discussed above, none of the applied references taken alone or in combination provide a burner assembly with a base, a separator and a burner body with the lower portion as set forth in the claim. Even if the applied references could be properly combined, they do not teach each and every feature of the burner assembly of claim 142 with the base, the separator, and the burner body with the lower portion as set forth in the claim.

Further, the burner body of claim 142 has an upper portion with a contoured surface forming simulated burning members and a selected group of gas distribution apertures are concentrated relative to each other to provide a selected flame shape when the fuel gas flowing through the concentrated group of gas distribution apertures is ignited adjacent to the upper portion of the burner body. The burner body is constructed of a material that glows at selected color variations when the fuel gas is ignited adjacent to the contoured surface. A simulated log is adjustably positioned on the burner body adjacent to the simulated burning members. Any modification of the applied references to provide the burner assembly of claim 142 would destroy the intended function of at least the primary reference. Further, even if the applied references could be properly combined, they still do not teach each and every feature of the burner assembly with the base, the separator, the burner body, and the simulated log as set forth in the claim. Therefore, claim 142 is patentable over the applied references and is in condition for allowance.

Claims 143 and 144 depend from claim 142. For the reasons discussed above and the features of the claims, these dependent claims are patentable over the applied references and are in condition for allowance.

D. Rejection of Claims 53, 54, 60, 78, 93, 126, 127, and 136-138 Under 35 U.S.C. § 103(a)

Claims 53, 54, 60, 78, 93, 126, 127, and 136-138 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Shimek GB '328 in view of Rosiek and Palau and further in view of Shimek '237 or Whitaker. Shimek '237 is directed to an assembled gas fireplace combustion chamber that has a plurality of non-porous, cast fiber-reinforced floor panels. The floor panels are drilled or punched therethrough to provide gas supports in the floor panel of the fireplace. Shimek '237 does not correct the deficiencies of the primary, secondary, and tertiary references as discussed above. Further, there is no teaching, suggestion, or motivation for modifying the portable indoor/outdoor burner assembly in accordance with the teachings for a combustion chamber with a floor panel having apertures therein. Shimek GB '328 on the other hand specifically teaches a dual-purpose burner assembly as discussed above and teaches away from the sole-purpose construction set forth in Shimek '237. Whitaker is directed to a gas-fired appliance with a sealed gas box or manifold with a simulated coal effect that is shaped to conform to the shape of the gas box or manifold on which it sits. Whitaker also does not correct the deficiencies of the primary, secondary, and tertiary references as discussed above.

Any modification of the applied references to provide the claimed invention would only be apparent to one skilled in the art after understanding the present invention and applying impermissible hindsight analysis. Further, the Examiner has had to combine four different references in a piecemeal construction using the benefit of hindsight analysis based upon the teachings of the present application to provide an asserted interpretation of the prior art. The applied references, howerve, provide no suggestion or motivation for combining features of four references to provide the claimed burner assembly. This piecemeal construction is improper to form the basis of a rejection under 35 U.S.C. § 103(a). Further, the combination of references asserted by the Examiner still does not teach each and every feature as recited in the claims. Therefore, for the above reasons, the rejected claims are patentable over the applied references and are in condition for allowance.

E. Rejection of Claims 57, 76, 77, and 105 Under 35 U.S.C. § 103

Claims 57, 76, 77, and 105 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Shimek GB '328 in view of Rosiek and Palau, and further in view of Smith '944. Smith is directed to apparatus for generating infrared radiation. The infrared generators of Smith generally have a felted fiber matrix pad through which a gaseous combustion mixture is passed to emerge from one surface and to burn at that surface to heat the surface to incandescence and thus generate infrared energy. Smith does not correct the deficiencies of the primary, secondary, and tertiary references. Further, the combination of the four references to support the obviousness rejection is based upon a piecemeal construction of features of four different patents with the benefit of impermissible hindsight analysis in an effort to provide a burner assembly as claimed in the present application. Even if the references could be properly combined, the four applied references still do not teach or suggest a burner assembly with each and every element as recited in the claims. Such piecemeal construction of the prior art can not support a Section 103 rejection. Therefore, in view of all of the arguments set forth above, applicants respectfully submit that claims 57, 76, 77, and 105 are patentable over the applied references and are in condition for allowance.

F. Conclusion

In view of the above amendment, the pending application, including all pending claims, is in condition for allowance. Applicants therefore request reconsideration of the application and an allowance of all pending claims. If the Examiner wants to discuss the above amendments or any other issue, the Examiner is encouraged to call Robert G. Woolston at (206) 359-3259. Additionally, if the Examiner notices any informalities in the application, he is encouraged to contact Mr. Woolston to expediently correct any such informalities.

Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 50-0665, under Order No. 243148001US3 from which the undersigned is authorized to draw.

Dated: 5-16-06

Respectfully submitted,

By _____

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